No. 96-1714

Supreme Court, U.S.
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In the
Supreme Court of the United States

October Term, 1996

DOROTHY C. ELLIOTT AND ARCHIE ELLIOTT, JR.,
AS REPRESENTATIVES OF THE ESTATE OF ARCHIE ELLIOTT, III,
Petitioners,

v.

JASON LEAVITT AND WAYNE CHENEY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The only issue before the court of appeals was the correctness of the district court's determination that there was a genuine issue of fact for trial on respondents' claim of qualified immunity. That court consequently lacked jurisdiction under this Court's decisions in *Johnson* v. *Jones*, 115 S.Ct. 2151 (1995), and *Behrens* v. *Pelletier*, 116 S.Ct. 834 (1996). Respondents have said nothing that can justify the assertion of jurisdiction by the court of appeals in this case.

Without a strong argument on the merits against summary reversal, and with the remarkable suggestion that not even intercircuit conflict on the basic issue of appellate jurisdiction raised by the petition need trouble this Court, Respondents' Brief in Opposition ("Opp. Cert.") 23, respondents rely most heavily on the contention that this Court lacks jurisdiction to entertain the petition for certiorari in this case. This is a red herring. Under well-settled law, this Court has jurisdiction to hear this case. And indeed, in order to make sure that there could be no debate about this point, petitioners sought, and were granted, an order of the court of appeals that, under the rules articulated in this Court's precedents, ensures that the petition in this case is timely, even if it otherwise would not have been.

ARGUMENT

1. Respondents concede the rule, Opp. Cert. 18, which is in any event clear: Where summary judgment on grounds of qualified immunity is denied on a "purely legal" ground "separable" from the merits of the plaintiff's claim, the court of appeals has jurisdiction to hear an immediate appeal of the district court's ruling. *Johnson* v. *Jones*, 115 S.Ct. at 2155-57. Where such a denial turns only on a "determination that there is a genuine issue of fact" for trial, 115 S.Ct. at 2159, it does not. See *Behrens*, 116 S.Ct at 842.

Respondents now claim, however, that the question before the court of appeals was the "purely legal" — and thus immediately appealable — one whether a police officer who in fact was, or believed himself to be, threatened with a gun as the officers here claimed, was entitled to qualified immunity. See Opp. Cert. 22-23. They claim that

> [t]he district court did not find a dispute of fact as to whether the gun was in Elliott's hands. Rather, the court disputed whether the officers' reaction to the perceived threat was

> reasonable in view of the fact that Elliott had been patted down earlier and his gun was not loaded.

Opp. Cert. 22.

This is demonstrably false. There has never been any dispute that, *if* Elliott had pointed a gun at the officers, or even if they erroneously *believed* he pointed a gun at them, their use of deadly force would have been objectively reasonable, and they would be entitled to qualified immunity. See Petition for Certiorari ("Cert. Pet.") 8. The district court did not conclude otherwise. The sole basis for its denial of summary judgment was that there was a genuine issue of material fact as to whether or not Elliott even held a gun at the time of the shooting. See Petition Appendix ("App.") A45-A46.[1] The district court denied summary judgment not because it believed respondents' actions might have been unreasonable even if there had been a perceived threat, but because "a reasonable trier of fact could come to a conclusion that things simply *did not happen* as the officers said." App. A46 (emphasis added).[2]

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[1] Despite the statement in respondents' brief (a statement with which petitioners agree) that an officer can lawfully defend himself against a person who "appear[s] to him to be pointing a gun in his direction," Opp. Cert. 3, respondents have never claimed that they only *mistakenly* believed that Elliott had a gun and was pointing it at them. Nor do they make that claim here. See Opp. Cert. 3-4 n. 3 (stating the distinction between claiming that the officers perceived that Elliott had a gun and claiming that Elliott actually had a gun "is irrelevant"). This would be a particularly difficult claim for the respondents to make after producing a gun that they claim Elliott was holding at the time of the shooting. The factual question in dispute in this case is not about reasonable-but-mistaken perception, but only about whether Elliott in fact held a gun at the time of the shooting.

[2] Respondents quote language from the district court describing how the officers might have responded if they had actually perceived Elliott to be holding a gun, App. A45, in order to suggest — falsely — that the district court concluded that the officers' use of force was unreasonable because even if the officers had actually perceived the threat they described, they still would not have had to use the *amount* of force they did. See Opp. Cert. 4. In context, however, it is plain that the district court was not second guessing the reasonableness of the officers' judgment, Opp. Cert. 4, 22, but was only suggesting that, in light of the limited threat that might have been presented

Respondents — seeking to characterize as "uncontroverted" the very facts that the district court found were in dispute — repeatedly suggest before this Court that the district court found as a fact that "the decedent made a gesture with his hands still cu[ff]ed behind his back which appeared to them to be him pointing a gun in their direction," see Opp. Cert. 2, 3 (both quoting App. A41); see also *id.* at 4 n. 3 ("At the very least, the district court found evidence that the officers in fact perceived a deadly threat."). Even a cursory reading of the opinion of the district court demonstrates, however, that the district court did *not* find that Elliott made a gesture that could have led the officers to believe he was pointing a gun at them. The sentence from which respondents extracted their quotation actually says: "*According to the statements by the defendants* . . . the decedent made a gesture with his hands still cu[ff]ed behind his back which appeared to them to be him pointing a gun in their direction . . . ." App. A41 (emphasis added).[3]

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by a handcuffed man in these circumstances, the *motive* for the shooting might not in fact have been self-defense at all — an additional evidence-based reason for doubting that the circumstances of Elliott's death were as the officers described. See App. A45; see also, *e.g.*, App. A32 (Motz, J., dissenting) ("a jury could infer that the firing of twenty-two bullets at a handcuffed man evinces a motive other than self-defense").

[3] This misrepresentation is typical of respondents' brief. Respondents describe as "uncontroverted" their own testimony — testimony which is drawn into question by other pieces of evidence in this case. See, *e.g.*, Opp. Cert. 7 (describing Elliott holding a gun); *id.* at 8 (same); *id.* at 9 ("Elliott never dropped the gun"); *id.* (referring to the recovered weapon as "Elliott's gun"). Respondents also attempt to bolster their case by mischaracterizing some of the other evidence in the record. Contrary to respondents' assertion, Sergeant Brown did *not* "observ[e] Officer Cheney retrieve the gun from Elliott's body." Opp. Cert. 20. His testimony is clear that he could not see the place from which Officer Cheney retrieved the gun, because Officer Cheney stood with his body blocking Sergeant Brown's view. See 4th Cir. App. 244-245. In addition, contrary to the suggestion of respondents, there was no testimony that Elliott released his seatbelt prior to the shooting. Opp. Cert. 7. Officer Leavitt testified that he secured Elliott in the police cruiser, 4th Cir. App. 44, and Sergeant Brown testified that, immediately before the shooting, Elliott appeared to be strapped in. 4th Cir. App. 238. The only testimony regarding release of the seatbelt came from Officer Cheney who testified that Elliott's

2. Respondents also argue that the court of appeals's assumption of jurisdiction in this case was justified because, even if the "purely legal" question described above was not presented on appeal, this case still "involves a question of law" inasmuch as "[t]he sufficiency of the evidence to support a *prima facie* case is first a question of law for the court." Opp. Cert. 18; see also *id.* (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986)).

This argument, too, is unavailing, for this purported "purely legal" question is nothing more than the question whether there is a "genuine issue of material fact" — the very question that this Court ruled unanimously in *Johnson* is *not* "purely legal" and can *not* be reviewed at the summary judgment stage by way of interlocutory appeal.

Respondents suggest nonetheless that an appeal is permissible here because there was *no* evidence in the summary judgment record that called into question their testimony that Elliott was pointing a gun at them when they killed him. See Opp. Cert. 18-19. In this they repeat the court of appeals's own circular argument that it was somehow permitted to hear the appeal challenging the district court's determination that there was a "genuine" issue of fact for trial because it concluded that the district court was simply wrong in finding the facts to be "[c]ontroverted" by "any evidence." See App. A10.

But of course *Johnson* and *Behrens* apply to *all* claims that a district court erred in finding a "genuine" issue of material fact — even those claims asserting that the court made such an error in the face of a complete absence of evidence supporting the nonmoving party. Indeed, *Johnson* itself *holds* that the court of appeals lacks jurisdiction to hear an interlocutory appeal alleging only that summary judgment was wrongly denied because there is "no evidence" in the record to support the conclusion that there is a genuine issue of material fact as to qualified immunity. See *Johnson*, 115 S.Ct. at 2154 (defendant officers "argued, in relevant part, that the denial [of summary judgment] was wrong because the record

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body was not belted in when he went to remove it from the cruiser *after* he and Officer Leavitt killed Elliott. 4th Cir. App. 187. There is no reason to think that the seatbelt was not released, if indeed it was released at all, by the barrage of gunfire fired at Elliott from point-blank range.

contained 'not a scintilla of evidence . . . that one or more' of them had 'ever struck, punched or kicked the plaintiff, or ever observed anyone doing so.'") (citation omitted). In asserting jurisdiction to determine whether there was a "genuine dispute" "[a]s to the material facts," App. A10, the court of appeals simply defied this Court's decisions in *Johnson* and *Behrens*.

The claim that the summary judgment record contains "no evidence" supporting petitioners is, furthermore, as demonstrably wrong factually as it is immaterial legally. For this is *not*, as respondents assert repeatedly, a case in which the denial of summary judgment depended on nothing more than the view that, in some purely "metaphysical" sense, Opp. Cert. 19, the "uncontroverted evidence [was] 'inherently improbable.'" Opp. Cert. i (Question Presented). Nor did the district judge rely on petitioners' "merely raising the issue of credibility," Opp. Cert. 19, or on "self-serving speculation and conjecture." Opp. Cert. 18.

On the contrary, as the district court opinion makes clear, the district judge found that "[t]here are significant issues of material fact that are present in this case," App. A46, based upon the physical and other evidence in the summary judgment record, see, *e.g.*, App. A45 (observing that Elliott was "hand cuffed in a vehicle with his hands behind his back"); *id.* (observing that Elliott had been "searched by an officer, who one would think if he's presumed to have acted regularly, might have found the weapon and did not"). Indeed, as we demonstrate in the petition for certiorari, Cert. Pet. 18-20, the case that there is a genuine issue of material fact here is even stronger than the district court asserted.

Respondents argue strenuously that there is "evidence" supporting *their* version of events. See Opp. Cert. 19-20. That makes no difference. The district court did not determine that there was *no* evidence to support the officers' version of events; the district court determined only that there was sufficient evidence that things "did *not* happen as the officers said" to require trial. App. A46 (emphasis added). The district court, of course, did not make *any* judgment about the officers' credibility and has not determined that the officers were lying or that Elliott in fact had no gun at the time of the shooting. It held only that these are questions for trial. The district

court issued an appropriately measured ruling, stating that

> it may well be that the officers are telling the truth, and I don't presume that one way or another. . . I think fairly . . . there are enough circumstances that a judge making this as a preliminary call could say that a reasonable trier of fact could come to a conclusion that things simply did not happen as the officers said they did.

App. A45-46.

3. Respondents' brief in opposition *could* be read to argue that summary judgment should not have been denied here — and that an appeal was not jurisdictionally barred — because the petitioners did not *themselves* come forward with the evidence on which they rely. See, *e.g.*, Opp. Cert. 18 (petitioners "offered no" evidence); *id.*, at 19 (petitioners did not "fulfill their burden on summary judgment to refute the evidence demonstrated by Respondents with evidence that would be admissible at trial"). The suggestion would be that the court of appeals had jurisdiction to hear *this* legal issue — whether the nonmovants produced their *own* evidence.

But if respondents intend to advance such a view, they simply misunderstand the procedure for summary judgment, which is to be decided on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Fed. R. Civ. P. 56(c). It is well settled that there is no requirement that the *nonmovant* introduce the evidence upon which it would rely to defeat a motion for summary judgment, and that one may oppose summary judgment in reliance on whatever material is in the record before the district court. See *Celotex Corp.*, 477 U.S. at 324; 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2727, at 138-142 (1983).

4. Finally, respondents raise their jurisdictional argument, a smokescreen designed to obscure matters just enough to deter this Court from appropriately exercising its certiorari jurisdiction. This Court should not be misled.

a. Even without the court of appeals's re-entry of judgment, the

petition for certiorari in this case was timely. See Cert. Pet. at 14 n.5. For the court of appeals recalled its mandate without explanation on the very day it issued. This action served to suspend the finality of the court of appeals's judgment, rendering any certiorari petition prior to the denial of rehearing premature. See *Missouri* v. *Jenkins*, 495 U.S. 33, 46 (1990). A mandate may properly be recalled "only when good cause or unusual circumstances exist sufficient to justify a modification or recall of a prior judgment." *Nevius* v. *Sumner*, 105 F.3d 453, 460 (9th Cir. 1996) (internal quotation marks and citation omitted). When a court of appeals recalls its mandate, as the court below did on December 2, 1996, it thus eliminates the certainty and finality of the judgment that are the necessary "prerequisite to a review in this Court." *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264, 268 (1942) (per curiam).[4]

Respondents suggest, citing this Court's Rule 13.3, that only a "petition for rehearing . . . timely filed in the lower court by any party" will stop the certiorari clock running. It is settled, however, that certain actions other than the "timely fil[ing]" of a petition for rehearing described in Rule 13.3 will serve to toll the time for filing a petition for certiorari. This is not because of any rule of this Court, but because these actions — like the timely filing of a rehearing petition — prevent "the judgment of the [lower] court as originally entered . . . . [from] becom[ing] final," as required in order for the jurisdictional time limit for filing for certiorari under 28 U. S. C. § 2101 to run. See, *e.g.*, *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940) (time tolled by lower court consideration on the merits of untimely petition for rehearing even when it was ultimately denied); *Pink*, 317 U.S. at 266 ("motion for reargument or rehearing"); accord *Jenkins*, 495 U.S. at 46 (petition for rehearing suspends finality of

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[4] Indeed, in those circumstances in which respondents agree that finality of the court of appeals's judgment is suspended, that suspension is reflected in a stay of the mandate. See Fed. R. App. P. 41(a) (timely filing of a petition for rehearing stays mandate which must issue seven days after entry of an order denying the petition). By contrast, in those circumstances in which the finality of the court of appeals's judgment is not suspended, the mandate is not stayed. See Fed. R. App. P. 35(c) (the pendency of a suggestion for rehearing *en banc* shall not "affect the finality of the judgment of the court of appeals or stay issuance of the mandate").

lower court's judgment so that "while the petition for rehearing is pending, there is no 'judgment' to be reviewed").[5]

It is certainly clear that the Fourth Circuit understood and intended that its order recalling the mandate would suspend the finality of its judgment and stop the time for filing for certiorari. The court of appeals treated the mandate exactly as it would have if that court had pending before it a finality-suspending petition for rehearing. It issued its mandate seven days after its order denying rehearing. See Fed. R. App. P. 41(a). More importantly, the decisional law of the Fourth Circuit makes clear that that court treats its orders recalling the mandate as suspending the finality of judgment and stopping the time for seeking review in this Court. See *Moore* v. *United States*, 360 F. 2d 353, 357 n. 1 (4th Cir. 1965), cert. denied, 385 U.S. 1001 (1967).[6]

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[5] Indeed, for this reason this Court has consistently treated petitions for rehearing as tolling the time for seeking certiorari, independent of its adoption of Rule 13.3. See *Pink*, 317 U.S. at 266.

[6] Respondents suggest that the court of appeals's action did not suspend the finality of the court of appeals's initial judgment because, under this Court's Rule 13.3, "[a] suggestion . . . for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals." S. Ct. R. 13.3. Our primary argument of course has been that the order recalling the mandate, and not the court of appeals's *sua sponte* suggestion for rehearing *en banc*, stopped the certiorari clock, see Cert. Pet. 14 n. 5, not because it was a "petition" within the meaning of Rule 13.3, but because of its operative effect. Respondents' argument demonstrates, however, an independent reason their jurisdictional claim is wrong. All the evidence suggests that the court of appeals treated the suggestion for rehearing *en banc*, which it ultimately denied, as a petition for rehearing, bringing the matter within the scope of Rule 13.3 itself. The court of appeals recalled its mandate, which it would not have been required to do if it were considering only a suggestion for rehearing, see Fed. R. App. P. 35(c), and it followed the procedure for issuance of the mandate prescribed in Fed. R. App. P. 41(a), which addresses petitions for rehearing. This alone suffices under Supreme Court Rule 13.3 to render January 24, 1997, the date on which the court of appeals's judgment became final. See *Jenkins*, 495 U.S. at 48 (the court of appeals's use of the mandate-issuance procedure required in cases of denial of a petition for rehearing by Fed. R. App. P. 41(a) demonstrates that the court of appeals "interpreted and actually treated" the motion before it as "a petition for rehearing before the panel"); see also 4th Cir. R. 35(a) ("A suggestion for rehearing in banc must be made at the same time, and in the same document,

b. In any event, in light of the circumstances created by the court of appeals's unusual orders, petitioners acted in accord with the precedents of this Court to ensure that there could be no debate about the timeliness of the petition for certiorari. They sought re-entry of judgment as of the date of the denial of rehearing *en banc*. And this motion was granted without dissent by the *en banc* court of appeals.

Precisely this practice has been expressly approved by this Court. See *Wilkins* v. *United States*, 441 U.S. 468, 469-470 (1979) (per curiam) (re-entry of judgment will permit "fil[ing of] a timely petition for certiorari" even when undertaken after expiration of the original time for seeking certiorari); *Doherty* v. *United States*, 404 U.S. 28, 29 (1971) (per curiam) (remanding for re-entry of judgment so that petitioner's time for filing a petition will run anew); *id.*, at 36 (Douglas, J., concurring). Respondents do not specifically address the cases from this Court cited by petitioners, only suggesting vaguely that they are distinguishable because they are criminal cases. See Opp. Cert. 15 n. 25. But that is immaterial. These were not cases in which the Court chose to *waive* the time limit for seeking certiorari, a power that the Court has in criminal cases because the time limit there is not jurisdictional. Cf., *e.g.*, *Durham* v. *United States*, 401 U.S. 481, 481-482 (1971) (per curiam). Rather, these were cases in which this Court made clear that re-entry of judgment would permit "the time within which [petitioner] may file his certiorari papers [to] run anew." *Doherty*, 404 U.S. at 36 (Douglas, J., concurring).

c. Finally, respondents' suggestion that petitioners have "utter[ly] disregard[ed]" this Court's rules cannot go unanswered. Petitioners have done nothing to violate any rule of this Court. This is not a circumstance, as respondents may be read to suggest, where petitioners *sought* delay, but failed to comply with the Rule 13.3 requirement of filing a petition for rehearing. See Opp. Cert. 12. The court of appeals's recall of its mandate was not sought nor was it caused by any action of the petitioners. Indeed, after the court of appeals's judgment was initially entered, petitioners intended, and they instructed their attorneys on their behalf, to file a petition for certiorari before this Court challenging the court of appeals's exercise

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as a petition for rehearing.").

of appellate jurisdiction. And, after the court of appeals issued its order denying rehearing, petitioners took the appropriate course described by this Court's precedents to ensure that there could be no doubt whatever about this Court's jurisdiction to entertain that petition.

CONCLUSION

Most telling is respondents' invitation that this Court ignore the need for uniformity in federal law, and for adherence by the lower courts to its precedents. To be sure, "the Fourth Circuit . . . is not required to interpret every case exactly the way every other circuit interprets it," Opp. Cert. 23, and "the Fourth Circuit is not bound by decisions of other circuits." *Id.* (capitalization omitted). But it is axiomatic that the Fourth Circuit, no less than any other, is bound by the decisions of this Court, which expends much of its energy precisely to resolve conflicts among the lower federal courts. When uniformity of federal law is disrupted not merely by one court of appeals's failure to follow "decisions of other circuits," Opp. Cert. 23, but by its failure to follow this Court's clear command in decisions the "clear import" of which "[o]ther federal courts have had no difficulty in following," this Court has found it appropriate to grant certiorari and to summarily reverse. See *Thurston Motor Lines, Inc.* v. *Jordan K. Rand*, 460 U.S. 533, 534-535 (1983) (per curiam). That is the course this Court should take here.

Unlike a situation in which a court of appeals has, at worst, misapplied a settled rule of law to the particular facts before it, here the court of appeals has employed transparently circular reasoning to avoid the import of clear and recent decisions of this Court that limit the scope of appellate jurisdiction. See *supra* at 4. In such circumstances, particularly since the question is one of *judicial power*, even if one were to conclude that the court of appeals had, in passing, also correctly *described* the limits of its jurisdiction as set forth in this Court's clear precedents, the court of appeals's action outside those jurisdictional limits, in unmistakable defiance of these precedents, would clearly warrant reversal.

This Court should therefore grant certiorari, summarily reverse or vacate the judgment of the Fourth Circuit, and remand the case to that court with directions that the appeal be dismissed for want of jurisdiction.

Respectfully submitted,

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